

PRACTICE GUIDELINES MEMORANDUM

TO: Attorneys Practicing Before This Court and Other Interested Persons

FROM: Jerry A. Funk
United States Bankruptcy Judge

DATE: August 5, 1999

RE: Guidelines for Preparing and Submitting
Proposed Forms of Orders

Following are general guidelines that you may find helpful as to the preparation and submission of proposed forms of orders for cases and proceedings pending before me in the United States Bankruptcy Court, Middle District of Florida, Jacksonville Division.

Sample order forms have also been included throughout this memorandum. These samples are included in the hope that they will be helpful to attorneys practicing before this Court. In reviewing these samples, please keep in mind the following points:

1. These samples are not intended to be required forms. They merely illustrate compliance with the principles described in this memorandum. Other forms of orders, which comply with these principles, are equally satisfactory. However, it is recommended that these forms be followed.
2. These samples are not intended to cover all situations that may arise. Tailoring to the circumstances is always required. Please do not use these illustrations as forms in circumstances when they do not apply.

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I. GENERAL INFORMATION

Orders should follow the following general outline:

A. Title

Include in the title a description of the order and the relief accorded by the order.

Examples:

1. “Order Modifying Automatic Stay in Favor of Creditor, Rock Solid Bank”
2. “Order Allowing Claim No. 9”

NOTE: The title “Order” is insufficient. It provides no help when one is searching through the docket or the file for a particular order. See L.B.R. 9072-1(a). Order titles should reveal the issue before the Court and the result.

B. Introduction

Always begin with “This case is before the Court on/for...” “Consideration” means considered in chambers without a hearing. I **DO NOT** use the expression “ex parte.” “For hearing” means a hearing was held and I determined the matter at the hearing. If a hearing was held, **ALWAYS** include the date of the hearing.

Examples:

1. “This case is before the Court for consideration of Debtor's application to approve the employment of counsel.”
2. “This case is before the Court on Trustee’s Objections to Claim No. 9 filed by Rock Solid Bank. After a preliminary hearing held on [MONTH] [DAY], [YEAR]...”

C. The decision or determination

Next recite what happened and the reasons why the Court entered the order. The reasons that the order is being entered should be stated accurately. The Court only enters orders based upon “the evidence presented” or “upon the consent of the parties.” Rarely, if ever, are orders based “upon the argument of counsel.”

1. If the Court’s oral ruling at the hearing is to constitute the basis for the decision, simply recite that. **DO NOT** summarize or restate the basis or reasons for the Court’s

oral decision in the proposed form of order unless specifically requested to do so. (Please note that Fed. R. Civ. P. 52(a) sets forth when findings and conclusions are required.)

Examples:

- a. If Fed. R. Civ. P. 52 findings and conclusions are not required: "For the reasons stated orally and recorded in open court that shall constitute the decision of the court,".
 - b. If Fed. R. Civ. P. 52 findings and conclusions are required: "At the conclusion of the hearing, the court made findings of fact and conclusions of law stated orally and recorded in open court. Based upon that decision,".
2. If the parties have agreed to the entry of the order in the form proposed, recite that.

Examples:

- a. "The parties have filed a written stipulation agreeing to the entry of an order containing these terms."
 - b. "At the hearing, counsel announced on the record the parties' agreement to the entry of an order containing these terms."
 - c. "Counsel for the movant represented to the court at the hearing that the respondent, who did not attend the hearing, consents to the entry of an order containing these terms."
3. If the Court has directed a response to a motion and the respondent has failed to respond, or if the respondent failed to appear at the hearing, then the court may grant the motion because the respondent has not opposed the motion despite an opportunity to do so. Simply recite all of this as the reason for the order. Specifically note the failure to respond or the nonappearance of the respondent when either occurs. Avoid the use of the word "default." That is a Fed. R. Civ. P. 55 term of art not applicable in this situation.

Examples:

- a. "Although the Court directed a response to the motion, the respondents failed to file a response. The Court therefore deems the motion to be unopposed."

- b. "The respondent failed to appear at the hearing. The Court therefore deems the motion to be unopposed."
- c. "Respondent failed to appear, nonetheless dealing with the motion on its merits, the Court finds...."

NOTE: Generic reasons for the entry of the order, such as "Being fully advised in the premises..." are insufficient.

D. The disposition and relief

Next state what the Court ruled and what form of relief is granted. Begin this section with "...it is **ORDERED:**". Be sure to enumerate the items.

Examples:

...it is

ORDERED:

1. The Motion is granted.
2. The complaint is dismissed without prejudice to the right of Plaintiff to file an amended complaint within ten days from the date of notice of the entry of this order.
3. Failure to do so will result in dismissal of the complaint with prejudice without further order.

OR

...it is

ORDERED:

1. The Objection is sustained.
2. Claim No. 9 filed by Rock Solid Bank is disallowed in its entirety.

NOTE: In adversary proceeding judgments, the Court often uses the language "**ORDERED AND ADJUDGED.**"

E. Date line and signature block

The date line and signature block should never be on a separate page from the rest of the order. There must be some text on the page with the signature. I prefer not to sign, and will not sign an order that has nothing but the **ORDERED** block and signature line at the top of the signature page. See L.B.R. 9072-1(b).

F. Service information

The names, designation (debtor, attorney for debtor, attorney for creditor, trustee, etc.), **and complete mailing addresses** of all parties who are to receive copies of the order when entered should be included at the end of the order. A mere listing of the names of the parties is insufficient. Service must be done in accordance with Fed. R. Bankr. P. 2002, 7004, and L.B.R. 2002-1, unless otherwise indicated by Court.

G. Terms of art

There are several bankruptcy terms of art that should be used carefully in orders:

1. Motions and applications are “granted” or “denied;” objections are “sustained” or “overruled.” Proofs of claim and claims of exemption are either “allowed,” “disallowed,” or some combination of both.
2. Petition: This term is only used to refer to the first pleading filed in a bankruptcy case.
3. Case: This term is only used in the context of the main bankruptcy case. When preparing an order in the main case, this is the only proper word to use. Do not use “matter,” “action,” or “cause” in this or any other context.
4. Proceeding or adversary proceeding: These terms are only used in connection with actions filed pursuant to Fed. R. Bankr. P. 7001. All proposed orders prepared in adversary proceedings should use one of these two terms to differentiate it from a “case.”
5. Complaint: This term is only used to refer to the first pleading filed in an adversary proceeding.

In addition, orders should be concise and contain plain, simple language. Avoid compound words and archaic language. The following is a partial list of words and phrases that should be avoided if possible:

aforementioned; hereby; be and the same; ordered, adjudicated, and decreed; thereby; aforesaid; heretofore; as evidenced by the signature of the parties’ attorneys; in said

[district, case, etc.]; hereinafter; **by** and through; otherwise being fully advised in the premises; it is further ordered; **done** and ordered in chambers; etc.

H. Other things to remember

1. Abbreviations should be avoided in proposed orders. Spell out the entire acronym at least once with the acronym in parenthesis next to it. For example:
 - a. Internal Revenue Service (“IRS”)
 - b. Environmental Protection Agency (“EPA”)
2. Orders submitted to amend an error in a previously entered order should recite the date and title of the original order. The amended order should be titled as such and contain a brief explanation of the amendment. If appropriate, the amended order should note that it revokes and replaces the previously entered order.
3. Check proposed orders for grammatical and spelling mistakes.

I. Copies and envelopes

Service copies of the order and stamped addressed envelopes for service must also be submitted. See L.B.R. 9072-1(c). In addition, if a proposed order is not presented to the Court during the hearing, the preparer should also submit an explanatory letter to the Court when the proposed order is submitted.

J. Proper format checklist

1. Does the proposed order contain proper service?
 - a. Pursuant to Fed. R. Bankr. P. 7004?
 - b. Pursuant to Fed. R. Bankr. P. 2002?
 - c. Does the order serve the same parties served in the motion?
2. Does the proposed order comply with L.B.R. 9072-1?
 - a. Full descriptive title detailing nature of motion or application and the Court’s ruling.
 - b. No proposed order or judgment will be signed where the date or signature is the only text on a page.
3. Does the proposed order contain a “DATED” line? Remember, do not use “in chambers” or “Duval County.”
4. Does the proposed order contain complete addresses in the service list?
5. Does the proposed order serve the United States Trustee and the Attorney for the Trustee (if appropriate)?

6. Have you verified the language in the proposed orders?
 - a. Orders employing professionals: compensation will be determined pursuant to 11 U.S.C. § 330.
 - b. Order for Relief from Stay: descriptive title, basis for relief (upon evidence or upon consent of debtor and trustee), complete description of property, and language explaining the “in rem” jurisdiction limitation.
 - c. Order on Contested Matters: citing the specificity of the sequence of events.

II. ORDERS GRANTING RELIEF FROM STAY

Stay relief orders require the following components:

A. Introduction

Examples:

1. “This case came before the Court upon the Motion for Relief from Stay filed by [CREDITOR](Movant). Upon the hearing held on [DATE], and...
2. “This case came before the Court upon the Motion for Relief from Stay filed by [CREDITOR] (Movant). Upon consideration by the Court and...

B. Basis of the court's determination

State why the order is being entered. State the precise reasons, not some generic, “one size fits all,” boilerplate reason. If there were consents filed, be sure to include this language.

Examples:

1. “...the failure of Trustee or Debtor to appear in opposition...”
2. “...the written consents of Trustee and Debtor...”
3. “...the oral consents of Trustee and Debtor at the hearing...”
4. “...the failure of Trustee or Debtor to respond to the motion, after direction to do so...”
5. “...the failure of Debtor, in his response to sustain the burden to demonstrate why the automatic stay should remain in effect as to the property in issue...”

C. The disposition

State whether the motion is granted or denied.

D. The relief

State precisely what relief is provided and state what the creditor may do pursuant to the order.

Examples:

1. "The Automatic Stay imposed by 11 U.S.C. § 362 is lifted as to Movant and it may proceed with the foreclosure of its lien on the following property...[DESCRIPTION OF PROPERTY]"
2. "The Automatic Stay imposed by 11 U.S.C. § 362 is modified to permit Movant to commence and prosecute a mortgage foreclosure action in state court against real property, the legal description of which is...[DESCRIPTION OF PROPERTY]"
3. "The Automatic Stay imposed by 11 U.S.C. § 362 is modified to permit Movant to take possession of and to sell its collateral, more particularly described as...[DESCRIPTION OF PROPERTY]"
4. "The Automatic Stay imposed by 11 U.S.C. § 362 is modified to permit Movant to prosecute through judgment his personal injury claim against Debtor presently pending in CASE NO. _____ in the Circuit Court for [COUNTY], Florida."

NOTE:

1. What the creditor can do must be specifically stated. Generalities, such as "to enforce its rights," are not sufficient.
2. The property must be described specifically. If the collateral is a vehicle, include the vehicle identification number, make, model, and year. If the collateral is real property, include the legal description.

E. The in rem limitation

Unless otherwise indicated by the Court, limit the relief to in rem only and not in personam against the debtor.

Examples:

1. "This Order is entered for the sole purpose of allowing Movant to obtain an in rem judgment against the property and Movant shall not seek an in personam judgment against Debtor.
2. "The relief granted herein permits Movant to seek and obtain an in rem judgment against the property only and does not permit Movant to seek or obtain an in personam relief against Debtor."

3. “In the event Movant obtains judgment against Debtor in the state court action, Movant may enforce the judgment solely against insurance proceeds. Movant may not enforce the judgment against Debtor, property of Debtor, or property of the estate absent prior Order of this Court.”

F. Stay lifted by default

If the stay is lifted based on default under an order granting adequate protection, the movant must file an affidavit, which contains the date of the order granting adequate protection and the specific default date. Make sure that the affidavit has been filed on the debtor and/or debtor’s counsel, and that they have not objected or responded within the time provided for in the Order Granting Adequate Protection. The proposed order must also contain the order date and the default date. **The proposed order should not be submitted until the notice period has run.**

EXAMPLE

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

In re:

[NAME OF DEBTOR(S)],

CASE NO.

Debtor(s).

_____ /

ORDER GRANTING RELIEF FROM AUTOMATIC STAY

This case is before the Court upon the Motion for Relief from the Automatic Stay filed by [CREDITOR] (“Movant”). After a hearing held on [DATE] and [BASIS OF COURT’S DECISION], it is

ORDERED:

1. Motion for Relief from Automatic Stay is granted.
2. The Automatic Stay imposed by 11 U.S.C. § 362 is lifted as to Movant and Movant may proceed with the foreclosure of its lien on the following property:

[LEGAL DESCRIPTION OF PROPERTY]

3. This Order is entered for the sole purpose of allowing Movant to obtain an in rem judgment against the property and Movant shall not seek an in personam judgment against Debtor(s).

DATED this ____ day of [MONTH] [YEAR], in Jacksonville, Florida.

Jerry A. Funk
United States Bankruptcy Judge

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III. ORDERS GRANTING ADEQUATE PROTECTION

The sample form that follows should generally be followed when submitting proposed orders for adequate protection to the Court. A common problem that arises in proposed orders granting adequate protection is the failure to include a proper legal description. If the collateral property is a vehicle, include the Vehicle Identification Number (VIN). If the property is real estate, then give the legal description. Simply including the address is insufficient.

EXAMPLE

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

In re:

[NAME OF DEBTORS]

CASE NO.

Debtor(s).

_____ /

ORDER GRANTING ADEQUATE PROTECTION

Upon a Motion for Adequate Protection filed by [CREDITOR] (Movant) and on the consent of Debtor(s) and the Chapter 13 Trustee, it is

ORDERED:

1. Movant holds a valid [lien] [mortgage] encumbering [real property described as: legal description or description of personal property] in which Debtor(s) has an interest.

2. Movant is entitled to receive direct adequate protection payments to be disbursed by the Trustee in the amount of \$_____ per month.

3. In accordance with the General Order of April 25, 1994, the Standing Chapter 13 Trustee shall pay to Movant the sum of \$_____ from each interim payment received from Debtor(s) after the date of this Order until further order of this Court. The Trustee shall send payments to the following address:

[address]

4. Debtor(s) shall be in compliance with the Order by timely making all interim Plan payments to the Trustee, except that a higher interim payment may be required if the Plan payment is not sufficient to provide for court-ordered adequate protection payments and payments to unsecured creditors as set forth in the Plan. In the event that a higher interim payment than that set forth in the Plan is required by the Trustee, the Trustee shall so indicate in the written response that she files to the Motion for Relief from Stay or for Adequate Protection.

5. Debtor(s) shall be in default under this Order if they fail to make any interim Plan payments not excused by Court order and they do not cure such default within ten days.

6. An order lifting the stay may be entered without further hearing ten (10) days after the Trustee or Movant files an affidavit of default, a copy of which must be served on Debtor's attorney. In the event that the affidavit of default is filed by Movant rather than the Trustee, it must state with particularity that information that Debtor(s) was not in compliance with this Order was provided by the Trustee's office on a date stated in the affidavit.

7. The Order shall be entered unless Debtor(s) has responded with a counter-affidavit or unsworn declaration under penalty of perjury to the effect that the most recently due interim payment was actually made to the Trustee no later than ten days after its due date. No other form of response shall be entertained.

8. Any order lifting the stay pursuant to this Order following the filing of an affidavit of default by any party shall be set aside without hearing upon the filing by the Trustee of a statement that the Debtor(s) was in fact, at all times in compliance with this Order, and that the stay was lifted in error.

9. In the event that a plan is confirmed by this Court, all interim payments will be applied to confirmed plan payments.

DATED this ____ day of [MONTH] [YEAR], in Jacksonville, Florida.

Jerry A. Funk
United States Bankruptcy Judge

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IV. ORDERS GRANTING EXTENSIONS OF TIME

Motions for Orders Granting Extensions of Time are usually considered in the first instance in chambers. I will set a hearing for these motions only if I believe it necessary.

- A. Motions for extension of time should include the following information:
 - 1. The original due date.
 - 2. The new date you want fixed as the due date. Please do not just request a set number of days and expect me to do the computations.
 - 3. The reasons the extension is required.
 - 4. Facts showing that the extension is not the result of the Movant's or counsel's procrastination or lack of attention.
 - 5. The other party's position with regard to the requested extension.
- B. File the motion in plenty of time so that, if a hearing is required, the hearing can be noticed and held **BEFORE** the expiration of the original due date.
- C. If the motion is filed **AFTER** the original due date, it must include facts showing excusable neglect. See Fed. R. Bankr. P. 9006(b)(1). If excusable neglect is not shown, expect such a motion to be denied.
- D. Always submit a proposed form of order with your motion.
- E. In the proposed form of order leave a blank for a new date and time. If there is a specific time requested, include this in the Motion.

EXAMPLE

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

In re:

[NAME OF DEBTOR(S)],

CASE NO.

Debtor(s).

_____ /

ORDER GRANTING MOTION FOR EXTENSION OF TIME
TO FILE [WHAT IS DUE]

This case is before the Court upon the Motion for Extension of Time [WHAT IS DUE] by [MOVANT]. Based upon the representations of Counsel in the Motion, it is

ORDERED:

1. The Motion for Extension of Time is granted.
2. [MOVANT] is given [NUMBER OF DAYS NECESSARY] from the deadline of [ORIGINAL DEADLINE], until [NEW DEADLINE] to file [WHAT IS DUE].

DATED this ____ day of [MONTH] [YEAR], in Jacksonville, Florida.

Jerry A. Funk
United States Bankruptcy Judge

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V. ORDERS GRANTING CONTINUANCES OF HEARINGS

The comments in Section III as to extensions of time are equally applicable to orders granting continuances of hearings.

A. In addition, include in the motion:

1. The earliest date the matter can be rescheduled and why.
2. Whether advancing the hearing date can solve the problem, and, if so, the earliest it can be advanced.
3. Most importantly, the other party's position. See L.B.R. 5071-1(b). I need to know the other party's position when I am considering the merits of the motion in chambers and without a hearing. If I am told the other party consents or has no opposition to the motion, I can more readily grant the motion without a hearing than I can if the party opposes the motion or if I do not know the other party's position. Even if the other party consents, I may still be required to deny the motion based upon calendar or case management considerations. Nevertheless, I am much more likely to grant the motion if the other party consents and such consent is noted in the motion.

B. Remember that all creditor-noticed hearings present special problems. See L.B.R. 5071-1(f). If the order reschedules an all creditor-noticed hearing, be sure to include the following as the last paragraph of the proposed order: "Counsel for the movant shall immediately serve a copy of this order on all creditors and parties in interest using a current mailing matrix obtained from the clerk. Counsel shall promptly thereafter file proof of such service."

C. Always submit a proposed form of order with your motion. See L.B.R. 5071-1(c). Include blank spaces in the proposed order for the clerk to enter the new dates. See id. Include copies and addressed, stamped envelopes. See id.

D. Motions submitted within two weeks of trial or hearing, absent unusual circumstances will be denied. See L.B.R. 5071-1(e). Therefore, get the motion in as soon as there is a foreseeable problem.

EXAMPLE

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

In re:

[NAME OF DEBTOR(S)],

CASE NO.

Debtor(s).

_____ /

ORDER GRANTING MOTION FOR CONTINUANCE

This case is before the Court upon the Motion for Continuance filed by [MOVANT].

Good cause having been shown, it is

ORDERED:

1. The Motion for Continuance is granted.
2. The hearing currently scheduled in this case for [DATE] at [TIME] in Room 200, United States Courthouse and Post Office Building, 311 West Monroe Street, Jacksonville, Florida 32202 is continued to _____ at _____ in Room 200 United States Courthouse and Post Office Building, 311 West Monroe Street, Jacksonville, Florida.

DATED this ____ day of [MONTH] [YEAR], in Jacksonville, Florida.

Jerry A. Funk
United States Bankruptcy Judge

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VI. ORDERS AVOIDING LIENS

A. Orders avoiding liens pursuant to 11 U.S.C. § 522(f) must specifically describe:

1. The lien being avoided.

Examples:

- a. “The judgment lien created by the recording of a certified copy of the final judgment rendered on [DATE], by the Circuit Court for Hillsborough County, Florida, in Case No. 93-1234, styled ‘Super Corporation v. John J. Jones,’ in Official Record Book 1234, at page 123, of the Public Records of Hillsborough County, Florida.”
- b. “A non-purchase money, non-possessory security interest created by the debtor's execution of a loan and security agreement in favor of Friendly Finance Corporation dated [DATE].”

2. The property on which the lien being avoided was fixed.

Examples:

- a. “The debtor's exempt homestead real estate, the legal description of which is..., Duval County, Florida.”
 - b. “A 27-inch Sony television model KV-1234.” Use the same description as that contained in the instrument creating the lien whenever possible. General descriptions, such as “household goods,” are not acceptable.
- B. An order should also include a recitation that the property was claimed and allowed as exempt. Be sure that the descriptions in the motion and the schedules are the same or that the property can otherwise be matched. An example of the order form follows this section.

EXAMPLE

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

In re:

[NAME OF DEBTOR(S)],

CASE NO.

Debtor(s).

_____ /

ORDER GRANTING DEBTOR'S MOTION TO
AVOID LIEN OF [CREDITOR]

This case is before the Court upon Debtor's Motion to Avoid Lien of [CREDITOR]. The [DESCRIBE LIEN] is on [DESCRIBE DEBTOR'S PROPERTY]. It is

ORDERED:

1. Motion is granted.
2. The lien by [CREDITOR] is avoided pursuant to 11 U.S.C. § 522(f).

DATED this ____ day of [MONTH] [YEAR], in Jacksonville, Florida.

Jerry A. Funk
United States Bankruptcy Judge

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VII. AGREED OR STIPULATED ORDERS

By definition, a request for an order, except when an application is authorized by the rules, is made by motion. See Fed. R. Bankr. P. 9013. To obtain an order, therefore, a motion must be filed. This means:

- A. Do not file stipulations and expect an order to be entered. Either support your motion with the stipulation, file a joint or agreed motion, or recite in your motion that you are authorized to represent that opposing counsel consents to the entry of an order granting the motion without further notice or hearing. A bare stipulation will simply languish in the file; I will take no action with respect to it until a motion is filed. This is also true of notices.
- B. Do not submit an "agreed order" containing counsel's signature at the end that authorizes the court to enter "the foregoing order." Not only does this violate the motion mandate of Fed. R. Bankr. P. 9013, but it also offends another principle, that is, orders are instruments of the court and should not contain counsel's signature authorizing such an order.
- C. In preparing a proposed form of order you submit in these situations, simply follow the general guidelines set forth elsewhere in this memorandum. Be sure to recite in the proposed order that it is being entered upon the stipulation or agreement of the parties in the manner described in Section I(C) above.
- D. Note that I generally do not approve stipulations in Chapter 7 and 13 cases. Rather I will enter an order in accordance with the language or agreement. Be sure that the language reflects this.
- E. Remember that in Chapter 11 cases, there must be Fed. R. Bankr. P. 4001(d) notice to other creditors.

VIII. ORDERS ALLOWING SUBSTITUTION OF COUNSEL

Motions to substitute counsel require **three** consents: from the withdrawing attorney, the new attorney, and the client. Once the consents are filed, the order should follow the format of the sample order on the next page.

If an individual is left without an attorney, the order should discharge the attorney, state that the individual will represent his/her own interest, and provide an address where the individual may be served.

Under this Court's local rules, a non-individual cannot be left unrepresented, so any motion to withdraw, which would result in a non-individual being unrepresented would require a hearing.

EXAMPLE

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

In re:

CASE NO.

[NAME OF DEBTOR(S)],

Debtor(s).

_____ /

ORDER ALLOWING SUBSTITUTION OF COUNSEL

This case is before the Court on a Motion for Substitution of Counsel. This Motion is consented to by the withdrawing counsel, appearing counsel, and Debtors. It is

ORDERED:

1. [NAME OF NEW ATTORNEY] is substituted as counsel for Debtors.
2. [NAME OF ORIGINAL ATTORNEY] is discharged from further responsibility of representation of Debtors.
3. All future pleadings shall be served upon [NEW ATTORNEY'S ADDRESS]

DATED this ____ day of [MONTH] [YEAR], at Jacksonville, Florida.

Jerry A. Funk
United States Bankruptcy Judge

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IX. DEFAULT OR “DROP DEAD” PROCEDURES

I will approve the following default procedures—read that to mean I will **NOT** approve some other procedures.

- A. State the default, such as non-payment or the like. Negotiate and include grace periods, as you desire.
- B. Upon default, the creditor may file and serve a motion for final order granting relief from the Automatic Stay. (Call it that so no additional filing fee will be required.)
 - 1. The motion shall be sworn to or otherwise supported by affidavit.
 - 2. The motion shall recite the facts of the entry of the original order establishing the payment or other requirement and the facts of default.
- C. The responding party shall have a stated amount of time (as the parties may agree) to file and serve a contravening affidavit or sworn response contesting only the fact of default. Other “defenses” will not be entertained.
- D. If such a contravening affidavit or sworn response is filed, the court will set a hearing on the motion for a final order on an expedited basis at the next available time. At that hearing, the court will determine if a default has occurred and dispose of the motion accordingly.
- E. If no such contravening affidavit or sworn response is filed, the movant may then submit a proposed form of order granting the motion for final order, and the court will consider the motion in chambers and without a hearing. The proposed form of order shall recite specifically what has happened and why the order is being entered.
- F. Please note:
 - 1. Although Fed. R. Bankr. P. 9017 and Fed. R. Civ. P. 43(e) permit the court to hear motions of this kind on affidavits, an affidavit submitted in support of the motion must set forth facts as would otherwise be admissible in evidence under the Federal Rules of Evidence through the witness making the affidavit. Accordingly, the affidavit must affirmatively show, on its face, that:
 - (a) The witness is competent to testify. FED. R. Evid. 601; Fla. Stat. §§ 90.601 - 90.603.
 - (b) The witness has personal knowledge of the facts stated. FED. R. Evid. 602. If the witness offers hearsay testimony, the affidavit must show that the testimony is within a hearsay exception. See, e.g., FED. R. Evid. 803(6) (when the witness relies on

business records). Absent extraordinary circumstances that are set forth in the affidavit, a client representative with knowledge must make the affidavit; counsel may not do so. First, counsel usually has no personal knowledge and is instead relying on inadmissible hearsay. Second, counsel is not usually permitted to offer testimony. Florida Rules of Professional Conduct Rule 4-3.7.

- (c) The witness has taken an oath or affirmation as to the truth of the facts stated in the affidavit. See FED. R. Evid. 603. If a notary public administers the oath, the notary's jurat or certificate of administration of the oath must be in correct form. See Fla. Stat. § 117.05(16)(a). A notary public's certificate of acknowledgment of execution in lieu of an oath is insufficient. See Fla. Stat. § 117.03. As an alternative to the use of a notary public, the witness may make an unsworn declaration under penalty of perjury in appropriate form. See 28 U.S.C. § 1746; Fla. Stat. § 92.525.
 - (d) In an event default has occurred, the affidavit must contain an affirmative statement of the specific facts demonstrating that the debtors are in default of their contractual obligations by the failure to make particular payments or to otherwise perform under the contract or adequate protection order.
- 2. The responding party will have the opportunity to contest the claim of default.
 - 3. The stay is not automatically modified in the future upon the happening or non-occurrence of a specified event. An order is required to modify the stay should the specified event happen or not occur.

X. JUDGMENTS AND ORDERS, ESPECIALLY (BUT NOT LIMITED TO) THOSE IN ADVERSARY PROCEEDINGS

- A. The federal rules make a significant distinction between a decision and a judgment. The rules further provide that judgments be set forth in a separate document, not added to the end of a decision. Fed. R. Bankr. P. 9021; Fed. R. Civ. P. 58. This is called the “separate judgment rule.” Thus, the rules require both a decision and a judgment; two distinct documents should be entered by the court.
1. Examples of decisions include:
 - a. Findings of fact and conclusions of law entered under Fed. R. Civ. P. 52. Findings and conclusions can be written or oral. I frequently dictate oral findings and conclusions on the record in open court.
 - b. An order granting a motion for summary judgment under Fed. R. Civ. P. 56.
 - c. An order granting a motion for judgment by default under Fed. R. Civ. P. 55.
 2. A decision must include the reasons of fact and law that cause the court to grant the relief requested. In a money judgment situation, the decision should contain the amount to which the plaintiff is entitled and how it is calculated. An appeal is taken from the **judgment**, but on appeal the reviewing authority will look to the **decision** to see why the trial court entered the judgment on appeal. If oral findings and conclusions were made, the reviewing authority looks to the transcript. If there are no reasons or if the reasons are insufficiently stated in the decision, the judgment will surely be reversed summarily.
 3. Remember especially that attorneys’ fees must be specifically alleged, Fed. R. Bankr. P. 7008(b); and that the relief contained in the judgment cannot exceed that pled in the complaint, Fed. R. Civ. P. 54(c). If you are seeking attorneys’ fees as part of your damage claim, include an affidavit of your time, rates, and the like. I will then determine the amount of your fees and include that in the decision document. If you are submitting a proposed form of decision document, prepare it with the necessary blanks so I can fill in the amounts I determine.
 4. The decision should conclude with words like:
 - a. “A separate judgment will be entered in accordance with these findings of fact and conclusions of law.”
 - b. “In accordance with Fed. R. Bankr. P. 9021, the court is contemporaneously entering a separate judgment.”

- B. The judgment should then generally be in the form contained in Fed. R. Civ. P. Form 32 as appropriately modified. In this court, however, it should be prepared for entry by the judge and not for entry by the clerk. Note that the title is “Judgment” and not “Final Judgment” as is the case under the Florida Rules of Civil Procedure. Fed. R. Civ. P. Form 32 may be found in the Appendix of Forms following the Federal Rules of Civil Procedure. See Fed. R. Civ. P. 84.
1. Fed. R. Civ. P. Form 32 is especially easy to follow in a money judgment situation.
 2. Consider the following examples of language for discharge and dischargeability judgments:
 - a. “The debtor is denied a discharge.”
 - b. “The debt owed by the debtor defendant, A.B., to the creditor plaintiff, C.D., on account number 123-456-789, is excepted from the discharge granted the debtor on [DATE] in this bankruptcy case.”
 - c. “The debt reduced to judgment in this money judgment is excepted from the discharge to be granted the debtor in this bankruptcy case, for which let execution issue.”
 3. The federal rules also include a “single judgment rule.” If the complaint seeks relief against multiple parties or involves multiple claims, one judgment only is entered after all of the claims against all of the parties have been determined. See Fed. R. Bankr. P. 7054(a); Fed. R. Civ. P. 54(b). In this event, there may be several decisions entered by the court throughout the course of the proceeding upon which the single judgment, entered at the end, is based. In extraordinary circumstances, but only with express determinations and directions, the court may direct the entry of judgment when fewer than all claims are determined. See id.
 4. Post-judgment interest is controlled by 28 U.S.C. § 1961, not the Florida statutes. If you are entitled to post-judgment interest, leave a blank line in the judgment for me to fill in the applicable rate on the day I enter the judgment, just as is shown in Fed. R. Civ. P. Form 32. The Administrative Office of the U. S. Courts informs me periodically of the applicable statutory rate or the current rate can be acquired by calling (202) 502-4369.
 5. I routinely grant costs to the prevailing party pursuant to Fed. R. Bankr. P. 7054(b). The amount of costs is not included in the text of the judgment as it is in Florida State practice. Rather, as shown in Fed. R. Civ. P. Form 32, the judgment simply contains a provision that the prevailing party shall recover its costs of action. After the entry of judgment, the party entitled to costs may file a “Bill of Costs” on a printed form that is available from the clerk. See 28 U.S.C. § 1920; Fed. R. Bankr. P. 7054(b); Fed. R. Bankr. P. 9021; Fed. R.

Civ. P. 58. If you are aggrieved by the clerk's action in taxing costs, file a motion to review the clerk's taxation of costs. See Fed. R. Bankr. P. 7054(b).

6. Be especially mindful of L.B.R. 7054-1 when seeking costs and attorneys fees. It establishes a short deadline after the entry of judgment by which you must file your bill of costs or motion to determine the amount of fees.
- C. As to motions for judgment by default, after a default has been entered pursuant to Fed. R. Civ. P. 55, refer to L.B.R. 7055-2. I also require that an affidavit or affidavits establishing all the material elements of the claim accompany the motion, including its validity and amount, if applicable. See Fed. R. Civ. P. 55(b)(2). An affidavit of non-military service must also be filed. The order granting motion for judgment by default must recite the facts established in the record supporting the judgment, including its amount. Remember: this is a decision document. A separate form of judgment is also required.

XI. SUBMISSION OF PROPOSED FORMS OF ORDERS

- A. Your attention is invited to the provisions of L.B.R. 9072-1(d) requiring that proposed orders submitted as a result of the court's ruling at a hearing shall be submitted within **three** days from the date of the hearing.
- B. As a matter of courtesy to the court, I request that all proposed orders submitted for my consideration be submitted with cover letters addressed to me and signed by counsel rather than signed by non-lawyer personnel. Counsel's signature is a statement that counsel has reviewed the proposed form of order and that it is correct and in appropriate form. Cover letters submitted with respect to proposed orders should not be addressed to the clerk. Proofread before you submit the proposed order.
- C. I also require that, in all contested matters and adversary proceedings counsel provide copies of the proposed forms of order to opposing counsel and all other appropriate parties, as the circumstances dictate, at the same time they submit the proposed forms of order to me. See Florida Rule of Professional Conduct 4-3.5(b).
 - 1. In all matters other than the most simple ones as to which there can be no reasonable objection to the proposed form of order submitted by counsel, my strong preference is that submitting counsel first obtain the approval of the form of proposed order from opposing counsel before submitting them to me and that submitting counsel affirmatively represent that approval in their cover letter.
 - 2. In all cases, cover letters should affirmatively reflect that copies are provided to opposing counsel and the other necessary parties. For this purpose, the copy notation "cc" and "with enclosure" with the names of the recipients typed at the end of the cover letter is sufficient.
- D. Also, please remember to include service copies and envelopes. See L.B.R. 9072-1(c).

XII. FURTHER QUESTIONS

Counsel should feel free to contact my law clerk at (904) 232-2470 if counsel has questions about preparing and submitting proposed forms of order in particular or about practice and procedure issues generally. Although my law clerk cannot provide legal advice, he or she will be more than happy to assist you with practice and procedure questions.